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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J. CONWAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

MICHAEL J. CONWAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 2a-14a) is reported at 595 F.2d 1157. The order of the district court (App. A, *infra*, 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1979. A timely petition for rehearing was denied on July 10, 1979 (App. C, *infra*, 15a). On

August 1, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant can, solely on the basis of a claimed possessory interest in contraband narcotics seized during the search of a co-defendant's suitcase, obtain suppression of the contraband at his trial for conspiracy on the ground that the search violated the Fourth Amendment.

STATEMENT

Respondent was indicted for conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. The district court suppressed the cocaine as the product of an unlawful search, and the court of appeals affirmed by a divided vote.

1. On March 1, 1978, local narcotics detectives in Miami, Florida, notified Drug Enforcement Administration agents at the San Francisco airport that, based on their observations in the Miami airport, they suspected respondent and co-defendant Carlo J. Mazzelli of smuggling drugs. They informed the DEA agents that respondent and Mazzelli were travelling together and would soon be arriving in San Francisco on a specified transcontinental flight (App. B, *infra*, 2a-3a; Tr. 11-13).[1] The agents then

[1] As used in this petition, "Tr." refers to the transcript of the suppression hearing of May 15, 1978, and "R." refers to the record in the court of appeals.

ran a check on respondent and Mazzelli with the DEA Intelligence Center in Los Angeles and determined that respondent was a suspected narcotics violator in the San Diego area (R. 57; Tr. 14). The DEA agents also contacted a deputy from the San Mateo County Sheriff's Office stationed at the San Francisco airport, who informed them that two traffic warrants were outstanding for Mazzelli's arrest (R. 60; Tr. 15-16, 76, 77, 79).

Three DEA agents went to meet the designated flight arriving from Miami. Respondent and Mazzelli departed the plane separately and gave the appearance that they were not travelling together (App. B, *infra*, 3a; Tr. 16). In the baggage claim area Mazzelli surreptitiously passed respondent a note, and they exchanged a few words behind a pillar (R. 57; Tr. 17). Each man then claimed his own piece of luggage and left the baggage area separately (R. 57; Tr. 18).

Mazzelli was thereupon approached by a DEA agent and the deputy sheriff, who advised him that he was under arrest on the outstanding warrants and that he would have to accompany them to the sheriff's office at the airport (R. 60-61; Tr. 81-83). Subsequently the suitcase that Mazzelli had been carrying was searched and was found to contain approximately seven pounds of cocaine. The officers seized the cocaine, and Mazzelli was placed under arrest by the DEA agent (R. 63; Tr. 91-94).[2]

[2] Mazzelli was indicted for possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841, and con-

In the meantime, the other DEA agents approached respondent as he left the baggage claim area. The agents identified themselves and asked to speak with him (R. 58; Tr. 18). After some protest, respondent accompanied the agents to a vacant office at the airport, where he was questioned about his association with Mazzelli (R. 58; Tr. 19, 22-23). When the agents questioning respondent were informed that cocaine had been found in Mazzelli's suitcase, they so advised respondent, who replied "You'll be arresting me, then, for conspiracy?" (R. 58; Tr. 23). Respondent was then placed under arrest.

2. Respondent and co-defendant Mazzelli moved to suppress the evidence obtained in the search of Mazzelli's suitcase (R. 3, 35). After a hearing, the district court granted the motion as to both defendants, holding that the warrantless search of the suitcase was unlawful (App. A, *infra*, 1a).

3. On the government's appeal,[3] a divided panel of the court of appeals affirmed. The court held that respondent's possessory interest in the seized cocaine entitled him to challenge the search of the suitcase.[4]

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spiracy, in violation of 21 U.S.C. 846. Mazzelli is not a respondent to this petition.

[3] The government appealed only on the question of respondent's standing (App. B, *infra*, 2a, 3a).

[4] The government conceded that respondent had a possessory interest in the cocaine (App. B, *infra*, 4a-5a, 9a). Respondent also filed an affidavit claiming that he had purchased the suitcase (*id.* at 4a; R. 82-83), but the district court did not resolve the question and the court of appeals did not rely on respondent's claim of ownership of the suitcase in ruling in his favor.

Judge Bonsal dissented on the ground that respondent's possessory interest in the cocaine established standing only as to the seizure of the evidence but not as to the search of the suitcase.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question regarding the scope of the Fourth Amendment.[5] The court of appeals' decision is inconsistent with recent decisions of this Court and creates a conflict among the circuits. Accordingly, review by this Court is warranted.

1. It is well settled that the Fourth Amendment protects individuals from unreasonable invasions of their legitimate expectations of privacy. See, *e.g.*, *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 15; *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977); *United States* v. *Miller*, 425 U.S. 435, 440 (1976); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Katz* v. *United States*, 389 U.S. 347 (1967); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be asserted vicariously.'" *Rakas* v. *Illinois*, *supra*, slip op. 5, quoting *Alderman* v. *United States*, *supra*, 394 U.S. at 174.[6] Accordingly, "[a] person

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[5] In *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 2 n.1, the Court found it unnecessary to reach the question whether a property interest in the items seized is an adequate ground for standing to object to the underlying search.

[6] The Court in *Rakas* abandoned the concept of "standing" under the Fourth Amendment, stating that "the better

who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman, supra,* at 174." *Rakas* v. *Illinois, supra,* slip op. 5.

The court of appeals' decision in this case—that an unlawful search of a third-party's property violates the defendant's Fourth Amendment rights solely because he claims a possessory interest in the items seized during the search—cannot be reconciled with these principles. While the defendant is entitled to challenge the legality of the seizure,[7] he has no interest cognizable under the Fourth Amendment that allows him to contest the lawfulness of the search of another person's property.[8] As then-Judge Stevens

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analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing" (slip op. 10-11). In this analysis the relevant inquiry is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect" (*id.* at 12).

[7] Petitioner has not attacked the seizure of the cocaine, but rather has focused exclusively on the antecedent search. In any event it is evident that, once the suitcase had been searched, the seizure of the cocaine in plain view was entirely proper.

[8] The holding of *United States* v. *Jeffers,* 342 U.S. 48 (1951), is not to the contrary. The defendant in *Jeffers* was found to have standing because of his interest in the premises searched as well as in the property seized. See *Rakas* v. *Illinois, supra,* slip op. 7. As the courts of appeals have recognized, the defendant's interest in the seized narcotics did not

explained in *United States* v. *Lisk,* 522 F.2d 228, 230 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976) (footnotes omitted):

> There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence * * *.

Petitioner's right to challenge the search should be no different here than if the officers had obtained a warrant to search Mazzelli's suitcase (see App. B, *infra,* 9a (Bonsal, J., dissenting)) or if Mazzelli had consented to the search (see *United States* v. *Lisk, supra,* 522 F.2d at 230 n.5). The court of appeals erred in failing to differentiate between the constitutionally distinct elements of the search and the seizure.[9]

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by itself establish his standing to challenge the search. See, *e.g., United States* v. *Jackson,* 585 F.2d 653, 657 n.5 (4th Cir. 1978); *United States* v. *Lisk,* 522 F.2d 228, 233 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976). In any event, more recent decisions of this Court cast substantial doubt on the continued validity of a rule that allows a defendant to challenge a search solely because of his interest in the items seized.

[9] The court of appeals was also incorrect in concluding (App. B, *infra,* 6a) that "[w]hen the purpose of the search is the discovery and seizure of certain property it is against the property and those laying claim to it that the search is directed. * * * [I]t would seem plain that the principal grievant [of the unlawful search] is the victim of the seizure that was the very purpose of the search." The Court has expressly rejected this "target" theory. *Rakas* v. *Illinois, supra,* slip op. 5-9.

2. The court of appeals also erred in allowing an asserted possessory interest in contraband to serve as the basis of respondent's Fourth Amendment claim. This Court has emphasized that only *legitimate* expectations of privacy can give rise to rights under the Fourth Amendment. See, *e.g.*, *Rakas* v. *Illinois*, *supra*, slip op. 13 n.9, 15 n.12; *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973); *Jones* v. *United States*, 362 U.S. 257, 267 (1960). Thus, the Fourth Amendment does not recognize a legitimate possessory interest in stolen property, and a person who is in wrongful possession cannot maintain a Fourth Amendment challenge to a search and seizure involving such property. See *Rakas* v. *Illinois*, *supra*, slip op. 13 n.9; *Brown* v. *United States*, *supra*, 411 U.S. at 230 n.4. See also, *e.g.*, *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971).

As in the case of stolen property, possession of contraband narcotics similarly cannot support a legitimate privacy interest under the Fourth Amendment. Since, by definition, contraband may not lawfully be owned or possessed, no one can have a legitimate proprietary or possessory interest in it. See *United States* v. *Archbold-Newball*, 554 F.2d 665, 677-678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977). See also, *e.g.*, *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir. 1979); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Emery*, 541 F.2d 887, 889-890 (1st Cir. 1976). Rather, such an asserted interest is "totally illegitimate" (*Brown* v. *United States*, *supra*, 411 U.S. at 230 n.4). Hence, regardless of whether a lawful interest in seized property would suffice to permit a defendant to challenge the validity of the antecedent search that uncovers the property, the court of appeals in this case improperly allowed respondent to seek suppression on the basis of his illicit interest in the cocaine.

3. The decision of the court of appeals creates a conflict in the circuits. Contrary to the court's ruling here, the other circuits that have addressed the issue have uniformly held that a defendant's possessory interest in items seized does not entitle him to object to the search of property in which he had no reasonable expectation of privacy.[10] In reaching the op-

[10] *United States* v. *Crowell*, 586 F.2d 1020, 1026 (4th Cir. 1978), cert. denied, No. 78-1022 (Mar. 19, 1979); *United States* v. *Jackson*, 585 F.2d 653, 656-659 (4th Cir. 1978); *United States* v. *Evans*, 572 F.2d 455, 486 (5th Cir.), cert. denied, No. 78-5068 (Oct. 2, 1978); *United States* v. *Hunter*, 550 F.2d 1066, 1074-1075 (6th Cir. 1977); *United States* v. *Smith*, 550 F.2d 277, 283 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Galante*, 547 F.2d 733, 736-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108, 1111 (7th Cir. 1977). See also *United States* v. *Wilson*, 536 F.2d 883, 885 (9th Cir.), cert. denied, 429 U.S. 982 (1976).

posite conclusion the court of appeals in this case expressly rejected this consistent line of authority (App. B, *infra*, 6a).

4. In the government's pending petition for a writ of certiorari in *United States* v. *Salvucci*, No. 79-244 (filed Aug. 14, 1979), we have asked the Court to decide the continued validity of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960).[11] The instant case, like *Salvucci*, presents issues concerning the vicarious assertion of Fourth Amendment rights by defendants whose own constitutional rights have not been infringed. In particular, both cases raise the issue whether a possessory interest in the items seized—either actual or imputed—is sufficient to permit a Fourth Amendment challenge to the search that discloses them. See Petition for a Writ of Certiorari, *United States* v. *Salvucci*, *supra*, at 9 n.8.[12] Because of the relation between *Salvucci* and the instant case, the Court may deem it appropriate to consider the cases in tandem.

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[11] We are providing to respondent's counsel a copy of the government's petition in *Salvucci*.

[12] The court of appeals in the present case relied on the theory of the "automatic standing" rule in reaching its conclusion that respondent had standing (App. B, *infra*, 7a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. CR. 78-132 CFP

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL J. CONWAY and
CARLO J. MAZZELLI, DEFENDANTS

ORDER GRANTING MOTION
TO SUPPRESS EVIDENCE

IT IS HEREBY ORDERED that the Defendants' Motion to Suppress as evidence the contents of defendant Mazzelli's suitcase obtained as a result of a warrantless search is granted. *United States* v. *Chadwick*, 433 U.S. 1 (1977).

DATED: 8 Sep. 1978.

Cecil F. Poole
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CARLO J. MAZZELLI and
MICHAEL J. CONWAY, DEFENDANTS-APPELLEES

April 27, 1979

Appeal from the United States District Court for the Northern District of California.

Before MERRILL and CHOY, Circuit Judges, and BONSAL,* District Judge.

MERRILL, Circuit Judge:

The sole issue presented by this appeal is whether Conway's Fourth Amendment rights were violated by the search of a suitcase in the possession of a codefendant, and the seizure of cocaine found in it, so as to give Conway standing to move to suppress the cocaine as evidence.

On March 1, 1978, law enforcement officers in San Francisco were notified by officers in Miami, Florida, that Conway and one Mazzelli were suspected of smuggling drugs and could be expected to arrive in San Francisco on a particular flight. On their arrival, they gave the appearance of traveling separately. Officers approached them separately, and detained and questioned them separately. Mazzelli was arrested on outstanding traffic warrants. His suitcase was searched and cocaine was discovered. Conway was then arrested.

* Honorable Dudley B. Bonsal, Senior United States District Judge of the Southern District of New York, sitting by designation.

In due course, Mazzelli was indicted on charges of possession and conspiracy, and Conway was indicted for conspiracy. Mazzelli moved to suppress the cocaine as the fruit of an unlawful search. Conway joined in the motion. After a hearing, the motion was granted as to both defendants. The government appeals. The appeal as to Mazzelli has been dropped, as the government now concedes that the search was unlawful. The appeal is pressed as to Conway upon the sole ground that Conway lacked standing to move to suppress, in that no Fourth Amendment right of his was violated by the search of Mazzelli's suitcase.

The grounds on which Conway asserts standing came to light in the course of hearings on the defendants' motions, including that of Mazzelli to suppress the evidence. The greater part of the hearings was taken up with argument and testimony in support of the government's position that the search was a lawful inventory search. Only after it became apparent that the court was convinced to the contrary did the question arise whether Conway's Fourth Amendment rights, as well as those of Mazzelli, were violated.

Conway asserted standing on two grounds. First, he filed an affidavit in which he stated:

> "At the time of the search of the luggage I had a possessory and proprietary interest in said luggage in that I purchased it.
>
> I affirm that I had a reasonable expectation of privacy as to the luggage and its contents at all times and that this expectation was violated by the police conduct in this case."

Mr. Swenson, counsel for the government, questioned this statement, saying that "Now [Conway] has filed a belated affidavit stating that he bought that suitcase. [Thus] he has alleged a possessory interest. I would request, however, that the court would require him to make—to put on the record how and under what circumstances he bought that." The district judge responded, "No, I'm not going to do any such thing."

Second, Conway claimed a possessory interest in the cocaine that was seized. It would appear that government counsel, given the government's theory of the case, could not avoid conceding that Conway indeed did have a connection with the cocaine amounting to a possessory interest:

> "THE COURT: I'm not sure why [Conway] was even arrested.
>
> MR. SWENSON: He was arrested because seven pounds of cocaine was found in Mr. Mazzelli's suitcase.
>
> THE COURT: On the theory that he had some connection with it.

MR. SWENSON: Yes, on the basis that he had been on—

THE COURT: If that is so, if that is the government's position, that the possession of contraband by Mazzelli was shared in to some extent by Conway, then, the government can concede that Conway has an interest in it.

MR. SWENSON: Well, his fingerprints were on it, your honor.

THE COURT: Well, that's all right. If his fingerprints are on it, the government concedes that there was some interest he had, and I think that is sufficient.

MR. SWENSON: And, if he wants to stipulate to that possessory interest—

* * * * *

MR. PADILLA [Conway's counsel]: We'll stipulate for the interest that Mr. Conway has.

THE COURT: For the purpose of this motion.

MR. KENNEDY: [Mazzelli's counsel]: Yes.

MR. LANG [Conway's co-counsel]: Yes.

MR. PADILLA: Yes.

MR. SWENSON: Can we get a ruling on the motion to sever, also?"

On appeal, the government asserts that the court erroneously granted Conway's motion to suppress on the ground of automatic standing under *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). The court's reasoning is not clear; and no findings were made. If the court was in fact relying on automatic standing, this was error. Automatic standing is available only to one charged with a crime of which possession is an essential element,

and conspiracy is not such a crime. *United States* v. *Prueitt*, 540 F.2d 995, 1004 (9th Cir. 1976), *cert. denied, sub nom. Temple* v. *United States*, 429 U.S. 1063, 97 S.Ct. 790, 50 L.Ed.2d 780 (1977). Moreover, the court may well have been in error in denying the government the right to examine Conway respecting his ownership of the suitcase. Nevertheless, we affirm the judgment below, on the ground that Conway established actual (as distinguished from automatic) standing to contest the search and seizure.

The court in *Jones* v. *United States, supra*, states the basis for standing under Rule 41(e) of the Fed. R.Crim.P.: "In order to qualify as a 'person aggrieved by an unlawful search or seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U.S. at 261, 80 S.Ct. at 731.

When the purpose of the search is the discovery and seizure of certain property it is against the property and those laying claim to it that the search is directed. If, in pursuit of the property, intrusion has been made upon the privacy of others, those others have also achieved standing. But it would seem plain that the principal grievant is the victim of the seizure that was the very purpose of the search.[1]

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[1] Judge Bonsal in his dissent cites authority that would seem to hold to the contrary. To the extent it does we must respectfully disagree.

The court in *Jones* recognizes both bases for standing in what it terms "the conventional standing requirement," 362 U.S. at 262, 80 S.Ct. 725: "that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Id.* at 261, 80 S.Ct. at 731. The court ruled that the defendant had standing in both respects—through an interest in the seized property and a sufficient interest in the premises searched. It was in connection with the former holding that the concept of what has come to be called "automatic standing" was announced. This concept is itself founded on the proposition that a possessory interest in that which was seized confers standing to challenge the seizure.[2] This same proposition has been recognized in later cases dealing with the concept of automatic standing.[3]

---

[2] The dilemma from which the rule provided an escape was "that possession both convicts and confers standing." 362 U.S. at 263, 80 S.Ct. at 732. The court concluded, "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure.'" *Id.* at 264, 80 S.Ct. at 733.

[3] In *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) a suitcase containing evidence incriminating the defendant was found in the basement of a house belonging to another. On motion to suppress the defendant testified that the suitcase was his. The testimony he gave was later admitted against him during his trial. The Court held that testimony given by a defendant on motion to suppress in order to establish his standing as one aggrieved by the search could not be admitted against him at trial on the issue of guilt or innocence. The court stated: "[t]he only, or at least the most natural, way in which [the defend-

The Supreme Court's latest discussion of standing to suppress the fruits of an unlawful search and seizure is found in *Rakas* v. *Illinois*, —— U.S. ——, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). That case re-examined the second portion of *Jones* dealing with standing based on an interest in the premises searched and the standards that should apply in such cases. However, in substance it reaffirmed the proposition recognized in *Jones* that a possessory interest in that which was seized confers standing.

The court first emphasizes the failure of the petitioner to assert a claim of ownership over the items seized —— U.S. at ——, n.1, 99 S.Ct. 421. To us this implicitly recognizes that a possesory interest in the evidence seized confers standing to challenge the seizure. This implicit recognition is later explicitly noted. After suggesting that a "casual visitor" should not be able to contest the lawfulness of a search, the Court states: "This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." *Id.* at ——, 99 S.Ct. at 430.

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ant] could found standing to object to the admission of the suitcase was to testify that he was its owner." 390 U.S. at 391, 88 S.Ct. at 974.

In *Brown* v. *United States*, 411 U.S. 223, 228, 93 S.Ct. 1565 1569, 36 L.Ed.2d 208 (1973) the court stated: "For example, under the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence * * *. Thus, petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in [the evidence seized]."

As we have noted Conway's possessory interest in the cocaine was established by stipulation in open court, invited by the government and not disputed. This suffices to confer standing to suppress the seized cocaine.

Judgment affirmed.

BONSAL, District Judge (dissenting):

I respectfully dissent. The majority holds that Conway has standing to contest the illegal search of the suitcase carried by Mazzelli when he arrived at San Francisco Airport. Implicit in this holding is that under the Fourth Amendment Conway had a reasonable expectation of privacy in Mazzelli's suitcase because of his uncorroborated statement that he had a proprietary interest in the suitcase and the cocaine contained therein, and the fact that his fingerprints were found on the package of cocaine.

At argument, appellant's counsel was asked if Mr. Conway's Fourth Amendment rights would have been violated if the Government, having obtained a search warrant for Mazzelli's suitcase, had searched it and found the cocaine. Counsel replied that the situation would be the same.

The narcotics business has often been characterized as one of "concealment and guile" and I think that the holding of the Court constitutes a dangerous precedent if narcotic traffickers are to be apprehended. It suggests to traffickers that they travel in tandem, each carrying the other's suitcase, so that the suitcase of the person apprehended and the con-

traband contained therein always belongs to his associate. Carried to its extreme, such a practice could mean that a narcotic trafficker's maximum risk would be confiscation of his contraband.

The primary purpose of the exclusionary rule is "to deter future unlawful police conduct . . . .", *United States* v. *Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974), and "compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). Notwithstanding its deterrent purpose, the rule has never been held to proscribe the use of all illegally seized evidence in all proceedings or against all persons. *United States* v. *Calandra, supra*, 414 U.S. 348, 94 S.Ct. 613. *E.g., Walder* v. *United States*, 437 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) (use of illegally seized evidence for impeachment purposes); *United States* v. *Calandra, supra* (use of illegally seized evidence in grand jury proceedings). The application of the rule has been and should be restricted to "those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra, supra*, 414 U.S. at 348, 94 S.Ct. at 620. If Mr. Conway's rights would be the same notwithstanding the procurement of a search warrant by the Government, the remedial purposes of the exclusionary rule would not be "efficaciously served." Rather, it would thrust upon law enforcement officials the unreasonable burden of establishing the ownership as well as the possession of the suitcase.

The court below proceeded on the assumption that suppression of the evidence as to Mazzelli (who was indicted for possession) required suppression as to Conway (who was indicted for conspiracy only), ("If I'm in error, then I might as well be in error on both of them." [Transcript of May 11, 1978 Hearing, 136-137]). If the court was relying on automatic standing, this was error. *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *United States* v. *Prueitt*, 540 F.2d 995, 1004 (9th Cir. 1976), *cert. denied sub nom. Temple* v. *United States*, 429 U.S. 1063, 97 S.Ct. 790, 50 L.Ed.2d 780 (1977).

Conway was allowed to establish actual standing by stipulating to a possessory interest in the seven pounds of cocaine found in Mazzelli's suitcase and by swearing in an affidavit that "At the time of the search I had a possessory and proprietary interest in said luggage in that I purchased it." [C.T. 82]. I believe that the evidence presented is insufficient to establish Conway's standing. His prior conduct was inconsistent with his later claim of ownership. The record shows that Mazzelli and Conway each carried a suitcase and each attempted to convey the impression that they were not traveling together. When Conway was questioned by DEA agents at the airport, he denied knowing Mazzelli, even *prior* to being informed of the cocaine seizure. At all times relevant to the search, Conway denied any connection with Mazzelli, *a fortiori* with Mazzelli's suitcase.

Further, the evidence that Conway's fingerprints were found on the package of cocaine is not dispositive; it is equally consistent with his being a coconspirator ("You'll be arresting me, then, for conspiracy?") and has little probative value with regard to his ownership of the suitcase.

The standing requirement of the exclusionary rule is premised on the view that the additional benefits derived from extending the rule to defendants other than the victim of the search are outweighed by the "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed.ed 176 (1969). It should be incumbent upon those who seek application of the rule to clearly demonstrate their entitlement thereto.* In view of the circumstances of the instant appeal, I believe that the matter should be remanded for a full evidentiary hearing.

The majority concedes that the court below may have erred in accepting Conway's uncorroborated assertion as to a "possessory and proprietary interest" in the suitcase. However, it goes on to affirm the decision on the ground that Conway established actual standing when he "stipulated" to a possessory interest in the cocaine.

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* "The burden [should rest] . . . upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade." *Stone* v. *Powell*, 428 U.S. 465, 500, 96 S.Ct. 3037, 3055, 49 L.Ed.2d 1067 (1976) (Burger, C. J. concurring).

I do not believe that this "stipulated" possessory interest is sufficient to establish actual standing under the circumstances. *See, Brown* v. *United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *United States* v. *Smith*, 550 F.2d 277 (5th Cir.) *cert. denied sub nom. Wallace* v. *United States*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977). In *United States* v. *Lisk*, 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 865, 47 L.Ed.2d 89 (1976), law enforcement officials seized in the trunk an illegal firearm in the course of a concededly illegal search of an automobile owned by one Hunt. Lisk, while he had no possessory or proprietary interest in the automobile, had a proprietary interest in the firearm. He contended that because of his interest, he was entitled to have the firearm suppressed. Judge (now Justice) Stevens differentiated between a search and a seizure: "A search involves an invasion of privacy; a seizure is a taking of property." 522 F.2d at 230. Judge Stevens then referred to *Alderman* v. *United States*, *supra*, which held that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are only aggrieved by the introduction of damaging evidence." 394 U.S. at 171-72, 89 S.Ct. at 965. *See, Rakas* v. *Illinois*, —— U.S. ——, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Judge Stevens held that Hunt, as owner of the automobile, was the victim of

the search and therefore had standing to contest the legality thereof, but Lisk, having neither a possessory nor proprietary interest in the automobile, did not have standing. As owner of the firearm, Lisk had standing only to contest the seizure, not the search. Since the seizure of the firearm was lawful under *Warden* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), the firearm was admissible against Lisk even though it could not be admitted against Hunt. 522 F.2d at 230-31. *Lisk* has been followed by the Second and Fourth Circuits. *United States* v. *Galante*, 547 F.2d 733, 739 n.11 (2d Cir. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *United States* v. *Jackson*, 585 F.2d 653, 656-57 (4th Cir. 1978). Therefore I believe that the stipulation as to Conway's proprietary interest in the cocaine was insufficient to establish his standing to object to the search of Mazzelli's suitcase.

I would remand the case to the district court for a full hearing.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

MICHAEL J. CONWAY, DEFENDANT-APPELLEE

[Filed July 10, 1979]

Before: MERRILL and CHOY, Circuit Judges, and BONSAL, District Judge

ORDER

In the above case Judge Choy has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc; Judge Merrill has voted to deny rehearing and recommend rejection of the suggestion for rehearing en banc; and Judge Bonsal has abstained from voting on the petition for rehearing, but adheres to the position expressed in his dissent.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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